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No. 99-1367

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

AMILIA ABBOTT, *et al.*,

Petitioners,

v.

MEDGAR EVERS HOUSES ASSOCIATES, L.P., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

In a civil action commenced under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.* ("RICO"),

1. Has a fully developed divergence evolved among the Circuit Courts of Appeal as to whether a plaintiff must establish that it received and relied upon the fraudulent statements contained in the interstate mailings and wire communications which serve as predicate acts for a RICO claim?

2. Did the Court below ignore this Court's holding in *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992), by adopting a "black-letter rule" that an injury to a plaintiff caused by misrepresentations to a third-party cannot serve as the basis for a cognizable RICO claim.

3. Did the Court below improperly append the element of justifiable reliance unto petitioners' RICO claim, thereby contradicting this Court's holding, in criminal mail and wire fraud proceedings, that "justifiable reliance . . . plainly [has] no place in the federal fraud statutes," in *Neder v. United States*, 527 U.S. 1 (1999).

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PRELIMINARY STATEMENT

Respondents respectfully submit this brief in opposition to the Petition for a Writ of *Certiorari* (the "Petition") to review the judgment of the United States Court of Appeals for the Second Circuit in the above-captioned case.

STATEMENT OF THE CASE

This action is symptomatic of the types of cases which have literally deluged the federal courts in recent years. Driven by the treble damage award provided by 18 U.S.C. § 1964(c), petitioners have sought to convert a prosaic landlord-tenant dispute into a "racketeering" action under the Racketeer Influenced and Corrupt Organizations Act ("RICO"). 18 U.S.C. § 1961, *et seq.* In essence, petitioners claim that Medgar Evers Houses Associates, L.P. ("MEHALP"), has not properly maintained Medgar Evers Houses, a low-income housing project, notwithstanding its receipt of rent subsidies from the Department of Housing and Urban Development ("HUD") pursuant to § 8 of the National Housing Act. 42 U.S.C. § 1441, *et seq.* Claiming that MEHALP fraudulently procured rent subsidy payments from HUD by misrepresenting the conditions at Medgar Evers Houses, petitioners have generally alleged that they "have suffered the substantial diminution in both the value of their occupancies as well as in the value of the millions of entitlement dollars paid to the owner on behalf of plaintiffs in the form of monthly rent subsidies." (Record 33, ¶ 77)[1] While petitioners' claims may be cognizable in state court, this landlord-tenant dispute hardly represents the type of "racketeering" activity which Congress intended to address when it enacted RICO.

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1. References are to the Joint Appendix filed with the United States Court of Appeals for the Second Circuit. These references are designated as ("Record [page]).

A. The Complaint

Petitioners commenced this action on or about May 22, 1997. In substance, petitioners claim that Medgar Evers Houses is fraught with local housing code violations, and that MEHALP and its former and current managing agents, BPC Management and New England Management, respectively, have done little, if anything, to remedy these conditions. (Record 23-25, ¶¶ 34-35, 37-38). Certain MEHALP, BPC Management and New England Management principals were joined as defendants. HUD and the Department of Housing Preservation and Development of the City of New York were also named as nominal defendants. (Record 19, ¶¶ 15-16)

Alleging that the "racketeering enterprise" was an "associated in fact" enterprise comprised of MEHALP, BPC Management, New England Management and the individual respondents, petitioners claim that respondents engaged in a "pattern of three distinct types of mail and/or wire fraud." (Record 26, ¶ 45; 29, ¶ 61)[2] Significantly, the alleged predicate acts upon which petitioners' "pattern of racketeering activity" is predicated were all addressed to HUD, which was responsible for disbursing the § 8 rent subsidies directly to MEHALP.[3]

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2. BPC Management and its former Vice President, Seymour Maslow, were named as defendants even though BPC Management had only managed Medgar Evers Houses "from in or about 1985 to in or about 1990." (Record 18-19, ¶¶ 11, 13). These claims were clearly barred by RICO's four-year statute of limitations. *See Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143 (1987); *Bingham v. Zolt*, 66 F.3d 553 (2d Cir. 1995), *cert. denied*, 517 U.S. 1134 (1996); *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096 (2d Cir. 1988), *cert. denied*, 490 U.S. 1007 (1989).

3. Pursuant to the National Housing Act, HUD provides mortgage insurance and mortgages to the private sector at below-
(Cont'd)

First, in connection with the submission of monthly Owner's Certifications to HUD, petitioners claim that MEHALP committed "mail and/or wire fraud" by making "false and misleading" representations respecting the "safe, decent and sanitary condition of each unit." (Record 27, ¶ 49) The alleged fraud is not further particularized. Petitioners did not describe the substance of these alleged misrepresentations or the circumstances surrounding them in their Complaint. Rather, they asserted conclusorily that the "mail and/or wire fraud" was engaged in by "someone acting at . . . [MEHALP's] direction" over "each and every month since December 1985." (Record 27, ¶ 49) However, the Complaint charges that the alleged fraud was addressed to HUD, and that, relying upon these purportedly fraudulent representations, HUD disbursed the rent subsidy payments to MEHALP. (Record 27, ¶ 50)

The second type of "mail and/or wire fraud" allegedly "consist[ed] of a series of written statements transmitted to HUD in response to the findings of site inspection reports and management reviews conducted by HUD between 1986 and January 1997." (Record 27, ¶ 51) While petitioners identified six letters by date, they did not specify the alleged fraudulent representations or the circumstances surrounding their transmittal other than to assert that they "were intended to mislead HUD about the defendants' management capabilities, integrity, honesty and/or competence to implement improvements and reforms at the Project," and that these "letters . . . repeatedly assured HUD that major repairs and improvements were imminent when, in fact, no such major repairs were planned or implemented." (Record 27-28, ¶¶ 51-52, 54) Like the first type of purported "mail

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(Cont'd)
market rates for the development of low-income housing. HUD also disburses monthly rent subsidy payments to owners of qualified developments to the extent that a tenant's monthly contract rental charges exceed 30% of the tenant's adjusted gross income.

and/or wire fraud," this "series of written statements" was indisputably directed to HUD. Moreover, according to petitioners, these fraudulent missives were allegedly "intended to lull HUD into inaction and induce it to forego punitive and/or remedial enforcement actions against MEHALP or its managing agents . . ." (Record 28, ¶ 54)

The third type of alleged "mail and/or wire fraud" was also purportedly directed exclusively to HUD. These allegedly fraudulent communications consisted of "monthly and annual financial statements submitted to HUD by or on behalf of MEHALP . . . regarding the costs and expenses incurred in the management and operation of the Project." (Record 28, ¶¶ 55-56) Petitioners neither specified the nature of these fraudulent statements, the period over which the fraud occurred nor the circumstances surrounding these transmittals to HUD other than alleging generally that the "purpose of these material misrepresentations . . . [was] to conceal from HUD the 'diversion' and misappropriation of Project funds," and that these "diverted" funds "consisted of the rent paid directly by plaintiffs and the rent subsidy paid on their behalf . . ." (Record 28-29, ¶¶ 56-57)

The Complaint sought, *inter alia*, unspecified treble damages, the dissolution of the reputed racketeering enterprise, the "imposition of a trusteeship and/or receivership of said enterprise and all of its assets wherever situated," and an order directing respondents to divest themselves of any interest in the "enterprise" and Medgar Evers Houses. (Record 34-35, ¶ 83)

B. Procedural Background

Prior to the filing of respondents' motion to dismiss, the parties entered into two, Court-ordered stipulations. The first stipulation, dated June 11, 1997, provided for the Court's appointment of Jeffrey Goldstein, President of ARCO

Management Corporation ("ARCO"), as a Receiver to manage and operate Medgar Evers Houses pending the final disposition of the action. (Record 38-39) Pursuant to the second "Stipulation and Order," dated August 7, 1997, HUD became a mortgagee-in-possession of Medgar Evers Houses. While this order vacated the Goldstein receivership, the order provided that HUD would appoint Mr. Goldstein as its managing agent "to continue to manage and run the Medgar Evers Houses property." (Record 40-42)

On or about November 3, 1997, respondents moved to dismiss the Complaint. By Memorandum and Order, dated October 23, 1998, the District Court dismissed the Complaint. (Record 86-102) The Court held that petitioners' RICO claims could not be sustained because petitioners were not directly injured by respondents' alleged conduct, and, therefore, lacked standing to assert RICO claims.[4] Having dismissed petitioners' substantive RICO claims, the District Court also dismissed petitioners' § 1962(d) conspiracy claim and declined to exercise jurisdiction over petitioners' state law claim pursuant to *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966).[5]

In an unpublished opinion, the United States Court of Appeals for the Second Circuit summarily affirmed the dismissal of petitioners' Complaint. Consistent with this Court's opinion in *Holmes v. Securities Investor Protection*

4. The Court also held that petitioners' § 1962(b) claim could not be maintained because petitioners had (a) failed to allege facts from which the Court could infer that respondents had acquired or maintained an "interest" in their "association" through a pattern of racketeering activity and (b) neglected to allege any acquisition injury resulting from the enterprise.

5. Petitioners had asserted a claim pursuant to New York Real Property Actions and Proceedings Law §§ 769-778, seeking the appointment of an administrator to manage the Medgar Evers Houses.

Corp., 503 U.S. 258 (1992), the Court held that petitioners had not demonstrated the "loss causation necessary for RICO standing" because they had "failed to establish that the defendants' misrepresentations were the proximate source of the tenants' injuries." (Petition at 6a) Significantly, rather than than embracing the so-called "convergence theory" of RICO standing advanced by petitioners and holding that petitioners lacked standing because they had not reasonably relied upon the alleged misrepresentations addressed to HUD, the Second Circuit adhered to the proximate cause precepts delineated by this Court in *Holmes*, determining that petitioners had failed to allege that they were directly injured as a result of these alleged misrepresentations. As the Court, relying upon *Holmes* and its progeny, instructed:

> [T]o plead a direct injury is a key element for establishing proximate causation, independent and in addition to the other traditional elements of proximate cause. Thus, the other traditional rules requiring that defendant's acts were a substantial cause of the injury, and that plaintiff's injury was reasonably foreseeable, are additional elements, not substitutes for alleging (and ultimately showing) a direct injury [to petitioners]. (Petition at 6a)

REASONS FOR DENYING THE PETITION

I.

THIS CASE IS NOT RIPE FOR REVIEW BY THIS COURT BECAUSE NO DIVERGENCE OF OPINION HAS DEVELOPED AMONG THE CIRCUIT COURTS OF APPEAL RESPECTING WHETHER THE RICO PROXIMATE CAUSE STANDING REQUIREMENTS SHOULD BE RESTRICTED BY THE ADOPTION OF THE "CONVERGENCE THEORY" OF LIABILITY

A. Standard of Review

The considerations governing the issuance of a writ of *certiorari* are detailed in Rule 10 of this Court. U.S. Sup. Ct. Rule 10. Petitioners are not entitled to such a writ as a matter of right. Rather, this Court has discretion to grant such applications, and a petition for a writ of *certiorari* "will only be granted for compelling reasons." *Id.*; *Durham v. United States*, 401 U.S. 481 (1971); *Fay v. Noia*, 372 U.S. 391 (1963) (the grant of a writ of *certiorari* is a matter of sound judicial discretion, and will be granted only where there are important and special reasons for doing so).

While this Court will grant a petition for a writ of *certiorari* to resolve important conflicts among the U.S. Courts of Appeals, *Braxton v. United States*, 500 U.S. 344, 347 (1991), there must be a "clear conflict" among the appellate courts to warrant such review. *United States v. Dionisio*, 410 U.S. 1, 5 (1973). Moreover, a divergence of opinion among the federal appellate courts on a question of federal law, while an important consideration in assessing whether to grant a petition for a writ of *certiorari*, is not a conclusive factor. 23 Moore's Federal Practice § 510.21[1] at 510-14.

As one noted commentator observed,

> [t]he nub of all these qualifications is that a conflict of decisions may safely be relied on as a ground for certiorari only in instances where it is clear that the conflict is one that can be effectively resolved by the Supreme Court alone, and that the disagreement among the lower courts is one that should be dissolved.

23 Moore's Federal Practice § 510.21[2] at 510-16 (quoting Harlan, "Manning the Dikes," 13 Record of the N.Y.C. Bar Association 541, 552 (1958)). *See also* Frankfurter & Hart, "The Business of the Supreme Court at October Term 1933," 48 Harv. L. Rev. 238, 268-69 ("the Court is interested in conflicts which impair uniformity of decision as to matters of importance.")

B. There is No Clear Conflict Among the Circuit Courts Respecting the Application of the Convergence Theory of Liability

Petitioners' application for a writ of *certiorari* is predicated upon the erroneous theory that a clear divergence of opinion has developed among certain federal appellate courts respecting the application of the *Holmes* standing and injury requirements. Specifically, petitioners contend that, for purposes of applying proximate cause analysis, the Second and the Fourth Circuit Courts of Appeal have adopted the purported "convergence" theory of liability in civil RICO cases in which mail (18 U.S.C. § 1341) or wire fraud (18 U.S.C. § 1343) serve as the underlying predicate acts. In sum, this theory, as articulated by petitioners, would restrict RICO standing only to those parties who directly relied upon the underlying predicate fraudulent statements. Petitioners argue that, while the First, Third and Fifth Circuit Courts of Appeals have adopted a policy-based proximate cause

standard consistent with the dictates of *Holmes*, *United States v. Christopher*, 142 F.3d 46, 53 (1st Cir. 1998); *Tabas v. Tabas*, 47 F.3d 1280 (3d Cir. 1995); *In re Burzynski*, 989 F.2d 733 (5th Cir. 1993), the Second and the Fourth Circuit Courts of Appeals have abandoned these policy considerations and will only afford civil RICO standing to parties who have directly relied upon the alleged fraudulent predicate acts, *Medgar Evers Houses Tenants Association v. Medgar Evers Houses Associates, L.P.*, __ F.3d __ (2d Cir. 1999); *Brandenburg v. Seidel*, 859 F.2d 1179 (4th Cir. 1988), *rev'd on other grounds*, *Quackenbush v. Allstate Insurance Co.*, 517 U.S. 706 (1996). (Petition 8-11)

A careful review of the allegedly divergent opinions in the Second and Fourth Circuits, together with the wealth of authority addressing the RICO proximate causation requirement in the Second Circuit, establishes that there is no divergence of authority in RICO cases predicated upon mail or wire fraud which would warrant review by this Court. Prior to analyzing this authority, however, an analysis of this Court's opinion in *Holmes* is merited.

1. *The Holmes Decision*

In *Holmes*, the Securities Investor Protection Corporation ("SIPC"), a private nonprofit corporation established pursuant to federal statute to provide financial protection to customers of failed broker-dealers, asserted RICO claims against 75 defendants, alleging that they had engaged in a fraudulent scheme to manipulate the stock of six public companies and that this scheme resulted in the demise of two broker-dealers, including First State Securities Corporation ("FSSC"). Defendants were officers and directors of the six companies and former principals and employees of the broker-dealers. *See Securities Investor Protection Corp. v. Vigman*, 908 F.2d 1461, 1464 (9th Cir.

1990), *rev'd sub nom. Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992).

The SIPC charged that defendants had manipulated the stock of these companies by making unduly optimistic statements respecting the companies' prospects and sold small positions in these stocks on an ongoing basis to create the appearance of market liquidity. The broker-dealers, which had purchased substantial amounts of the stock for their proprietary accounts, experienced serious financial difficulties after the fraud was discovered and the stock prices plummeted. These broker-dealers were eventually liquidated, and the SIPC advanced nearly $13 million to the broker-dealers' customers to satisfy their claims. The SIPC asserted that defendant Holmes had issued false statements regarding the prospects of one of the six companies, Aero Systems, Inc., of which he was an officer, director and major shareholder, and that he had sold small amounts of one of the other company's stock to stimulate a market in its shares. *Holmes*, 503 U.S. at 263.

The SIPC, claimed that it was subrogated to the rights of those customers who, while they had neither purchased nor sold the manipulated securities, had nevertheless incurred losses as a result of the financial collapse of the broker-dealers.

In analyzing RICO's standing requirements, this Court, relying upon its previous interpretations of the Clayton and Sherman Act standing provisions from which 18 U.S.C. § 1964(c) was fashioned, held that a party had standing to assert RICO claims only if it could establish that its injuries were both actually and proximately caused by the alleged RICO predicate acts. This Court also emphasized that the "proximate cause" standard was a legal construct which implicated a number of jurisprudential policy concerns.

As this Court explained:

> Here we use "proximate cause" to label generically the judicial tool used to limit a person's responsibility for the consequences of that person's acts. At bottom, the notion of "proximate cause" reflects "ideas of what justice demands, or of what is administratively possible and convenient. W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts, § 41, p. 264 (5th ed. 1984). Accordingly, among the many shapes this concept took at common law, *see Associated General Contractors, supra*, 459 U.S., at 532-533, 103 S.Ct., at 905-906, was a demand for some direct relation between the injury asserted and the injurious conduct alleged. Thus, a person who complained of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts was generally said to stand at too remote a distance to recover. *See, e.g.* 1 J. Sutherland, Law of Damages 55-56 (1882).

Id. at 268.

Those policy concerns, which this Court outlined in affirming the dismissal of the claims against Holmes relate to the jurisprudential impediments which the Courts would encounter by granting standing to too broad a spectrum of "injured" parties, and do not create a litmus test for the determination of civil RICO standing. As this Court generally cast this age-old conundrum:

> In a philosophical sense, the consequences of an act go forward to eternity, and the causes of an event go back to the dawn of human events, and beyond. But any attempt to impose responsibility

> upon such a basis would result in infinite liability for all wrongful acts, and would "set society on edge and fill the courts with endless litigation."

Id. at 266 n.10 (quoting W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts, § 41 at p. 264 (quoting *North v. Johnson*, 58 Minn. 242, 59 N.W. 1012 (1894)).

As this Court further explained, these jurisprudential considerations relate to the assessment and apportionment of damages, and the general impact which an unduly liberal standing rule would have upon the judicial system:

> Although such directness of relationship is not the sole requirement of Clayton Act causation, it has been one of its central elements, *Associated General Contractors*, 459 U.S., at 540, 103 S.Ct., at 909, for a variety of reasons. First, the less direct an injury is, the more difficult it becomes to ascertain the amount of a plaintiff's damages attributable to a violation, as distinct from other, independent factors. *Id.*, at 542-543, 103 S.Ct., at 910-911. Second, quite apart from problems of proving causation, recognizing claims of the indirectly injured would force courts to adopt complicated rules for apportioning damages among plaintiffs removed at different levels of injury from violative acts, to obviate the risk of multiple recoveries. *Id.*, at 543-544, 103 S.Ct. at 911-912; *Blue Shield of Virginia v. McCready*, 547 U.S. 465, 473-475, 102 S.Ct. 2540, 2545-2546, 73 L.Ed.2d 149 (1982); *Hawaii v. Standard Oil Co. Of Cal.*, 405 U.S. 251, 264, 92 S.Ct. 885, 892, 31 L.Ed.2d 184 (1972). And, finally, the need to grapple with these problems is simply unjustified by the general interest in deterring injurious

> conduct, since directly injured victims can generally be counted on to vindicate the law as private attorneys general without any of the problems attendant upon suits by plaintiffs injured more remotely. *Associated General Contractors, supra*, 459 U.S., at 541-542, 103 S.Ct., at 910-911.

Holmes, 503 U.S. at 269-70.

Considering the broad swarth which RICO could potentially cut across the jurisprudential landscape if its standing requirements are accorded too liberal an interpretation, these concerns applied with at least as much force in *Holmes*. Indeed, this Court, in affirming the dismissal of the claims against Holmes as "too remote," noted that, if it adopted the liberal standing rules being pressed by the SIPC, the salutary objectives of RICO would be irreparably compromised:

> [W]e fear that RICO's remedial purposes would more probably be hobbled rather than helped by SIPC's version of liberal constuction [of the standing requirements]: Allowing suits by those injured only indirectly would open the door to "massive and complex damages litigation [, which would] not only burde[n] the courts, but [would] also undermin[e] the effectiveness of treble damages suits." *Associated General Contractors*, 459 U.S., at 545, 103 S.Ct., at 912.

Id. at 274.

Thus, the standard articulated in *Holmes* is predicated upon the jurisprudential considerations which underlie traditional proximate cause analysis. While this Court, in *Holmes*, and other courts which have defined the universe of

potential claimants who have standing to sue for injuries which they have allegedly sustained have utilized judicial constructs such as the "directness" of the plaintiff's injuries and the "reasonable foreseeability" of those injuries, these concepts are merely terms utilized by the courts for determining, on a case-by-case basis, whether a party's injuries are cognizable at law. Indeed, the concept of "reasonable foreseeability" has served as the basis for "proximate cause" analysis since the New York Court of Appeals articulated the standard in *Palsgraf v. Long Island Railroad Co.*, 248 N.Y. 339, 162 N.E. 99 (1928), and is freighted with the same jurisprudential considerations outlined by this Court in *Holmes*.

2. *The Second Circuit Court of Appeals Has Not Adopted a "Reliance" Litmus Test in RICO Cases Predicated Upon Mail or Wire Fraud*

The Second Circuit Court of Appeals has not adopted a black letter "reliance" litmus test in RICO actions predicated upon mail or wire fraud, as argued by petitioners. Indeed, a review of the applicable authority in the Second Circuit only confirms that that Circuit has adhered to the flexible jurisprudential "proximate cause" standard articulated by this Court in *Holmes*.

For example, in *Sperber v. Boesky*, 849 F.2d 60 (2d Cir. 1988), the Second Circuit affirmed the dismissal of a RICO action commenced on behalf of investors who had purchased common stock or call options in six publicly-traded companies in which Ivan Boesky had an interest. In substance, the Complaint alleged that Boesky had engaged in securities fraud, commercial bribery, mail fraud and wire fraud, and that plaintiffs had been damaged when Boesky sold his stake in those companies without disclosing that he was about to plead guilty to securities fraud. Specifically, plaintiffs alleged that "[t]hey . . . [had] been damaged as a

result of their investment decisions to invest in takeover companies whose prices were artificially inflated as a result of the unlawful activities of [Boesky] and his reputation, falsely created and maintained." *Id.* at 62. Plaintiffs acknowledged that they had not been the direct targets of Boesky's alleged fraud. Nevertheless, they contended, like petitioners, that their "indirect" injuries were cognizable under RICO because these injuries were "reasonably foreseeable."

In dismissing this argument, the Second Circuit reiterated the jurisprudential considerations in which RICO "proximate cause" analysis is rooted:

> [W]e are usually skeptical of claims that a defendant is liable to hundreds of thousands or even millions of people, and the facts of this case do not require us to delineate the circumstances that would allow such a broad-ranging claim to stand. Plaintiffs were neither the targets of the racketeering enterprise nor the competitors nor the customers of the racketeer. Boesky did not cheat or deceive plaintiffs in any way with regard to the particular stocks in question since they did not know he had purchased them and he did not trade in them illegally. He did not corner the market or control the stocks in question. As noted above, *the doctrine of proximate cause reflects social policy decisions based on shared principals of justice*. Applying those principals, we conclude that Congress did not intend us to allow RICO recovery to plaintiffs with claims as attenuated as these.

Id. at 65 (emphasis supplied).

Similarly, in *In re American Express Shareholders Litigation*, 39 F.3d 395 (2d Cir. 1994), six American Express Company ("American Express") shareholders commenced a shareholder derivative action against certain present and former directors, officers and employees of American Express, claiming that defendants had violated RICO and their fiduciary duties to the shareholders by engaging in a defamatory campaign designed to compromise one of American Express's competitors. Plaintiffs alleged that American Express had incurred damages to "its business and property in that it has suffered the loss of substantial amounts in sales and profits, has been exposed to potential liability, [and] has incurred damage to its business and reputation" as a result of the failed campaign. *Id.* at 398.

In affirming the dismissal of plaintiffs' RICO claims, the Second Circuit explained that "the shareholders of American Express were not the intended targets of the RICO violations. Quite the contrary, the RICO violations were intended to benefit American Express by injuring one of its competitors . . . The injuries alleged thus were neither the 'preconceived purpose' nor the 'specifically intended consequence' of the defendants' act." *Id.* at 400. *Accord*, *Abrahams v. Young & Rubicam, Inc.*, 79 F.3d 234 (2d Cir.), *cert. denied*, __ U.S. __, 117 S. Ct. 66 (1996); *Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 23-4 (2d Cir. 1990); *Burdick v. American Express Co.*, 865 F.2d 527, 529 (2d Cir. 1989); *In re Crazy Eddie Securities Litigation*, 714 F. Supp. 1285 (E.D.N.Y. 1988) (Nickerson, J.).

Moreover, the Second Court, after noting that "*Holmes* essentially endorsed the definition of proximate cause that we had earlier adopted," analyzed the jurisprudential considerations which resulted in its determination that American Express had sustained neither "direct" nor "foreseeable" RICO injuries due to defendants' campaign against an American Express competitor:

> The normative considerations that informed the proximate cause analysis in *Holmes*, *Hecht* and *Sperber* weigh heavily in favor of not granting RICO standing to appellants. As in *Holmes*, the potential for duplicative recoveries created by granting standing to attenuated and indirect parties weighs against finding proximate causation. (Citation omitted) Such duplicative recoveries could well lead to, *inter alia*, superfluous deterrence. If appellants are correct that Freeman, Smith and Cantor [defendants] violated RICO by defaming Safra, then Safra, as the target and victim of the scheme, could sue Freeman, Smith and Cantor under RICO and recover treble damages for injuries to his business of property . . . such potential liability to the directly injured victim does create a significant deterrent to a RICO scheme.

American Express, 39 F.3d at 401.

In *Moore v. Painewebber, Inc.*, 189 F.2d 165 (2d Cir. 1999), the Court, in vacating the dismissal of a RICO claim which alleged that defendant had misrepresented a standard life insurance policy to be a form of individual retirement account, acknowledged that the Complaint properly averred that defendant had misrepresented the nature of the account and that plaintiffs had relied upon these representations. The Court, however, did not suggest that such reliance alone was sufficient to establish RICO standing. Indeed, the Court, citing *Holmes*, emphasized the traditional common law proximate causation requirements which the Congress adopted in enacting RICO:

> The inquiry into RICO's statutory purpose happens to lead back, at least in part, to the common law of proximate cause. Based upon an

> analysis of the statute's history, the Supreme Court has held that the language of 18 U.S.C. § 1964(c) reflects a congressional intent to require plaintiffs in civil actions under RICO to demonstrate not only but-for causation but also proximate causation as that concept is understood at common law.

Id. at 178.

The concepts of "foreseeability" and "direct injury" are, therefore, terms of art utilized in assessing whether a plaintiff's injuries are sufficiently proximate to warrant RICO standing. These concepts are rooted in the common law and represent flexible principles consistent with the jurisprudential considerations implicit in the doctrine of proximate causation.

The Second Circuit's decision in the case at bar does not represent a departure from these basic principles of proximate cause. The Court did not hold that petitioners had failed to state a RICO claim because petitioners had not relied upon respondents' alleged fraudulent misrepresentations. Rather, the Court, applying traditional proximate cause analysis, affirmed the dismissal petitioners' claims because petitioners' purported injuries could not be characterized as sufficiently direct to warrant RICO standing. As the Court observed:

> The tenants here failed to establish loss causation because they failed to establish that the defendants' misrepresentations were the proximate source of the tenants' injuries. "[T]o plead a direct injury is a key element of establishing proximate causation, independent of and in addition to the other traditional elements of proximate cause. Thus, the other traditional

> rules requiring that defendant's acts were a substantial cause of the injury, and that plaintiff's injury was reasonably foreseeable, are additional elements, not substitutes for alleging (and ultimately showing) a direct injury." *Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc.*, 191 F.3d 229, 235-36 (2d Cir. 1999).

(Petition at 6a)[6]

In sum, the Second Circuit Court of Appeals has consistently applied the traditional jurisprudential precepts outlined in *Holmes* for purposes of determining RICO standing. Whether the injury is characterized as "direct" or "foreseeable" is of no particular import. These are legal terms

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6. It should also be noted that, even if the Second Circuit decision in the case at bar could be construed as establishing a "reliance" proximate cause litmus test in RICO actions, the decision is an unpublished summary order which may not be cited as precedential authority. (Petition at 1a) Furthermore, even if this unpublished order diverged from the traditional proximate cause standards articulated by other Second Circuit panels, such "conflicts are better resolved by the court of appeals itself, sitting *en banc*." 23 Moore's Federal Practice § 510.21[2] at 510-15. *See Wisniewski v. United States*, 353 U.S. 901, 902 (1957) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties."). *See also* Harlan, *Manning the Dikes*, 13 Record of the N.Y.C. Bar Association 541, 552 ("[C]ontrary decisions between different panels of the same Court of Appeals will not be considered to present a reviewable conflict since such difficulties of views are deemed an intramural matter to be resolved by the Court of Appeals itself.").

Moreover, to the extent that petitioners contend that Supreme Court review is necessary to resolve purported conflicts among the district courts in the Second Circuit regarding the implementation of the "reliance" litmus test (Petition 13), it should be noted that such conflicts are also better left to the intermediary appellate courts rather than this Court. *See* 23 Moore's Federal Practice § 510.21[1] at 510-14.

utilized to state, in conclusory fashion, the courts' assessment that a RICO plaintiff's injuries are too attenuated to warrant RICO standing. Otherwise, the courts would be inundated with treble damage RICO suits which, like the case at bar, are no more than standard commercial disputes.

3. *The Fourth Circuit Court of Appeals Has Not Adopted a "Reliance" Litmus Test in RICO Cases Predicated Upon Mail or Wire Fraud*

Similarly, the Fourth Circuit Court of Appeals has not adopted a "reliance" litmus test for establishing proximate cause in RICO civil actions. Quoting selectively from *Brandenburg*, petitioners argue that the Fourth Circuit has held that "reliance is necessary to establish injury to business or property 'by reason of' a predicate act of mail fraud within the meaning of § 1964(c)." (Petition 10)

In fact, the Court, in *Brandenburg*, sustained the dismissal of a RICO complaint charging that the Maryland Savings-State Insurance Corporation ("MSSIC"), a quasi-public non-profit corporation had failed to properly regulate state-chartered savings and loan associations, resulting in substantial interest income losses to depositors. While the Court, in a footnote, did suggest that reliance was a necessary element for the establishment of RICO proximate causation (since the depositors had evidently not relied upon any misleading information disseminated by MSSIC), this footnote merely constituted dictum based upon no apparent authority. *Brandenburg*, 859 F.2d at 1187-88 n.10.

The Court ultimately affirmed the dismissal of the RICO claims against MSSIC based upon traditional proximate cause analysis:

> Causation principles generally applicable to tort liability must be considered applicable. These

> require not only cause-in-fact, but "legal" or "proximate" cause as well, the latter involving a policy determination: "whether the conduct has been so significant and important a cause that the defendant should be held responsible." [Citation omitted] As such, the legal cause determination is properly one of law for the court, taking into consideration such factors as the foreseeability of the particular injury, the intervention of other independent causes, and the factual directness of the causal connection.

Id. at 1189.

Indeed, the *Brandenburg* dictum was expressly rejected by the Fourth Circuit in *Mid Atlantic Telecom Inc. v. Long Distance Telephone Services, Inc.*, 18 F.3d 260 (4th Cir. 1994), in which the Court sustained a RICO complaint against the competitor of a reseller of long distance telephone services even though the allegedly injured reseller was *not* the immediate recipient of its competitor's fraudulent practices. With reference to the *Brandenburg* "reliance" dictum, the Court explained:

> We did not, however, intend to establish a rule that only injuries suffered by the immediate victim of a predicate act satisfied the "by reason of" requirement of § 1964(c). In conducting the traditional common-law proximate cause analysis, therefore, courts should focus on the temporal and circumstantial relationship between the defendant's conduct and the injury suffered by the plaintiff, and the foreseeability that intervening events would cause injury to the plaintiff . . . In *Brandenburg*, the causal connection was considered too tenuous, and plaintiff's theory ignored the more immediate causes of the injuries

> (*i.e.*, duplicity by the management of the savings and loans and failure of MSSIC to prevent those injuries.

Id. at 263.

Thus, it is evident that the purported conflict among the Circuit Courts of Appeals, as postulated by petitioners, does not, in fact, exist. None of the federal appellate courts which have considered the issue have restricted the *Holmes* proximate cause analysis such that only the immediate victim of the alleged predicate fraud is entitled to assert a RICO claim. Accordingly, there is no need for this Court to grant petitioners' application for a writ of *certiorari* since there is no clear divergence among the federal appellate courts with respect to the application of the *Holmes* proximate cause test.

II.

THE COURT BELOW DID NOT GRAFT A "RELIANCE" REQUIREMENT ON THE FEDERAL MAIL AND WIRE FRAUD STATUTES

In *Neder v. United States*, 527 U.S. 1, 119 S. Ct. 1827 (1999), this Court, in connection with its review of defendant's criminal mail and wire fraud convictions, observed that the "common-law requirements of 'justifiable reliance' and 'damages' . . . plainly have no place in federal fraud statutes." *Neder*, 119 S. Ct. at 1841. Petitioners contend that, by requiring that an injured party must demonstrate reasonable reliance upon the predicate misrepresentations in civil RICO actions based upon mail and wire fraud, the Court below improperly grafted a "reliance" element on the criminal mail and wire fraud statutes. This argument is clearly erroneous and does not deserve extended discussion. As detailed above, neither the Second Circuit nor any other federal appellate court has held that such reliance is necessary to establish RICO standing. Rather, traditional proximate

cause precepts govern the determination of whether a party has standing to assert RICO claims. These standards are governed by the jurisprudential considerations outlined in *Holmes*, which are typically determined based upon the "directness" and the "foreseeability" of the injuries.

This conclusion is confirmed by the Second Circuit's decision in *County of Suffolk v. Long Island Lighting Company*, 907 F.2d 1295 (2d Cir. 1989). In *Long Island Lighting*, utility ratepayers filed a RICO claim against Long Island Lighting ("LILCO"), claiming that LILCO's misrepresentations to the New York State Public Service Commission ("PSC") resulted in inappropriate rate increases. While the misrepresentations were made only to the PSC, and only the PSC could have relied upon the misrepresentations, the Court held that if LILCO's fraudulent statements had improperly caused rate increases, plaintiffs, although not the immediate targets of the fraud, would have standing to assert RICO claims because they would have been directly injured as a result of the fraud perpetrated upon LILCO.[7] *Id.* at 1311.

Thus, it is clear that the decision below, which was predicated upon the jurisprudential considerations implicit in the concept of proximate causation, neither established a restrictive black letter "reliance" standard in RICO actions predicated upon mail or wire fraud nor effected any modification of the statutory criminal mail and wire fraud statutes. Therefore, there is no basis for this Court to review that determination, as urged by petitioners.

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7. The Court concluded, however, that the evidence submitted at trial was insufficient to establish the necessary causal connection between LILCO's misrepresentations and the rate increases. *Id.* at 1311-12.

III.

THE SECOND CIRCUIT CORRECTLY AFFIRMED THE DISMISSAL OF PETITIONERS' RICO CLAIMS

The Court of Appeals correctly affirmed the dismissal of petitioners' RICO claims because any injuries allegedly sustained by petitioners, tenants in Medgar Evers Houses, as a result of misrepresentations purportedly made to HUD were much too attenuated to afford petitioners RICO standing. Indeed, the claimed injuries sustained by petitioners — the diminution of the value of their leasehold occupancies — only underscores the wisdom of the jurisprudential considerations articulated by this Court in *Holmes*. Significantly, petitioners do not claim that respondents failed to apply the HUD rent subsidies to their rental charges. Rather, they merely claim that respondents failed to properly maintain Medgar Evers Houses. How does one even begin to calculate the claimed diminution in the value of these tenants' leasehold occupancies? How are the alleged damages to be apportioned among the tenants of Medgar Evers Houses? Assuming that respondents misrepresented the condition of the housing project to HUD, HUD — and only HUD — sustained any direct injury because it would have been deprived of the rent subsidies under false pretenses and was in the optimum position to "vindicate the law as private attorneys general without any of the problems attendant upon suits by plaintiffs injured more remotely." *Holmes*, 503 U.S. at 269-70. *See Associated General Contractors of California, Inc. v. Carpenters*, 459 U.S. 519, 541-542 (1983).

With respect to the allegedly deteriorating condition of the housing project, we are confronted with what is essentially a landlord-tenant dispute which may be resolved by state courts which are designed to determine such disputes. The alleged damage to the "value of . . . [petitioners'

leasehold] occupancies" (Record 33, ¶ 77) cannot serve as the basis for federal RICO standing. Were that the case, the federal courts would literally be deluged with claimants asserting pedestrian state law claims (which would inevitably entail assertions of mail and wire fraud) in an effort to obtain the treble damage awards accorded by RICO.

In dismissing petitioners' claims, the District Court, concluded, like the Court of Appeals, that petitioners' alleged injuries were too indirect and attenuated to sustain RICO standing. In so doing, it clearly articulated the jurisprudential considerations which resulted in the dismissal of those claims:

> [The jurisprudential concerns expressed in *Holmes*] equally apply in this case . . . The second-level injuries plaintiffs claim to have suffered are analogous to those alleged by the SIPC in *Holmes* and would impose similar burdens on the courts. If this RICO claim proceeds, the fact-finder would be required to determine whether the complained of conditions at the Medgar Evers Houses in fact resulted from the false statements to HUD, as opposed to, for example, the defendants' poor management of the housing project. Putting that factual issue aside, permitting plaintiffs to maintain a treble damage action would seem to require the apportionment of possible recoveries among the directly defrauded (HUD) and others indirectly injured by the fraudulent scheme, a group not necessarily limited to plaintiff tenants. Finally, as in *Holmes*, the law need not shoulder these difficulties. HUD itself can deter fraudulent statements to HUD. Owners who make fraudulent statements face criminal prosecution under 18 U.S.C. § 1001, [Citation omitted], and remain

> subject to civil penalties and other remedies under the HUD regulations.

(Record 95-96)

Indeed, the decision below was entirely consistent with that reached in *Manson v. Stacescu*, 11 F.3d 1127 (2d Cir. 1993), a case which is directly analogous to this case. In *Manson*, two plaintiffs, one of which was an officer and fifty percent shareholder of Stavola-Manson Electrical Construction Company ("Stavola"), commenced a RICO action against 26 defendants, including Stavola's other fifty percent shareholder and a Stavola director, claiming that they comprised a RICO enterprise which "had looted the Company to the point of bankruptcy in order to enrich themselves." *Id.* at 1129.

Like petitioners, the *Manson* plaintiffs asserted that, as a result of defendants' illegal conduct, which allegedly included bribery, attempted extortion and mail fraud, the value of their interest in Stavola had declined appreciably. Like petitioners, the *Manson* plaintiffs asserted that they should be accorded RICO standing due to the nature of their relationship to defendants, contending that defendants had breached fiduciary duties to the shareholder plaintiffs. In rejecting these arguments, the Second Circuit held that neither the nature of the relationship between the parties nor the nature of the injuries allegedly incurred by plaintiffs could sustain a RICO claim since the injuries were derivative, rather than the direct result, of the predicate racketeering acts. Relying upon *Holmes*, the Court stated:

> The Mansons [plaintiffs] claim that David Manson has standing to sue as a fifty percent shareholder of the Company. A shareholder generally does not have standing to bring an individual action under RICO to redress injuries to the corporation in

> which he owns stock. *Rand v. Anaconda-Ericsson, Inc.*, 794 F.2d 843, 847 (2 Cir.), *cert. denied*, 479 U.S. 987, 107 S.Ct. 579, 93 L.Ed.2d 582 (1986). This is true even when the plaintiff is the sole shareholder of the injured corporation. *Sound Video Unlimited, Inc. v. Video Shack, Inc.*, 700 F.Supp. 127, 136 (S.D.N.Y. 1988). Since the shareholder's injury is not related directly to the defendant's injurious conduct.

Manson, 11 F.3d at 1131.

Reviewing the jurisprudential concerns at the heart of the *Holmes* decision, the Second Circuit concluded:

> These important policy concerns counsel strongly against a holding that would ease the requirements for standing under RICO. The Mansons essentially claim that the Company was looted, thereby causing the value of David Manson's shares to decline.

Id. at 1132.

While petitioners do not have an ownership interest in Medgar Evers Houses, they are effectively taking the same position as the Mansons. They claim that respondents have "looted" their § 8 subsidies, which they characterize as "entitlements," and have intentionally permitted the Medgar Evers Houses' infrastructure to deteriorate, thereby diminishing the "value of their occupancies." (Record 33, ¶ 77) Petitioners also contend that they should be accorded RICO standing because of the parties' landlord/tenant relationship, suggesting that they are "beneficiaries" of the § 8 subsidies. However, these perambulations only underscore the fact that there is no direct relationship between petitioners' alleged injuries and the allegedly fraudulent acts

addressed to HUD. Both *Holmes* and *Manson* instruct that such "indirect" injuries cannot convert this landlord/tenant dispute into a treble damage RICO action.

Ultimately, the question is where the courts should draw the RICO "standing" line. In *Holmes*, this Court instructed that, if a plaintiff could establish a *direct* relationship between its purported injuries and the predicate RICO acts, it could pursue a RICO claim. This standard represents the appropriate demarcation line, and was reiterated by the Second Circuit in this case. Should the courts cross that line and commence granting RICO standing to plaintiffs who have only been injured indirectly as a result of the activities of a reputed RICO enterprise, such a modification of the RICO standing requirements — one which is clearly being advanced by petitioners before this Court — would undermine the jurisprudential considerations inherent in the "proximate cause" precepts and convert a plethora of standard state law claims involving allegedly fraudulent statements, whether communicated by telephone or the mails — into federal racketeering claims. That was clearly neither the intent of the Congress when it enacted RICO nor the intent of this Court when it delineated the jurisprudential policy considerations underlying proximate causation for purposes of establishing RICO standing.

CONCLUSION

For all of the foregoing reasons, respondents respectfully request that this Honorable Court deny the petition for a writ of *certiorari*.

Respectfully submitted,

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